UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| GRANT WILSON, JR., Plaintiff and Appellant, vs. FRANK MADIGAN, Respondent and Appellee, THE PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest. | ) | No. 21684 |

# APPELLEE'S BRIEF

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General

JEROME C. UTZ
Deputy Attorney General

6000 State Building
San Francisco, California 94102
Telephone: 557-3299

Attorneys for Respondent-Appellee

TOPICAL INDEX

## TABLE OF CASES



## CONSTITUTION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| GRANT WILSON, JR., | ) | |
| | ) | |
| Plaintiff and Appellant, | ) | No. 21684 |
| | ) | |
| vs. | ) | |
| | ) | |
| FRANK MADIGAN, | ) | |
| | ) | |
| Respondent and Appellee, | ) | |
| | ) | |
| THE PEOPLE OF THE STATE OF CALIFORNIA, | ) | |
| | ) | |
| Real Party in Interest. | ) | |
| | ) | |

# APPELLEE'S BRIEF

## JURISDICTION

Plaintiff and appellant has invoked the jurisdiction of this Court under Title 28, sections 1291, 2241(a), 2241(c)(3) and 2253 which makes a final order in a federal habeas corpus case reviewable in a court of appeal when a certificate of probable cause is issued.

## STATEMENT OF THE CASE

### A. Proceedings in the state courts

On March 17, 1964, appellant, Grant Wilson, Jr., was convicted in the Superior Court of Alameda County of violating California Penal Code section 459 (burglary). Appellant was sentenced to state prison

for the term prescribed by law; the execution of sentence was suspended for four years, and appellant was granted probation, one of the conditions of which was that he serve one year in the county jail in custody of respondent sheriff (TR 22, 23).[1/]

Appellant appealed to the California Court of Appeal. On November 30, 1965, the Court of Appeal, First Appellate District, Division One, affirmed the judgment. People v. Wilson, 238 Cal.App.2d 447 (1965). A copy of the opinion of the Court of Appeal was appended to respondent's return. Appellant's application to the Supreme Court of California for a hearing of his appeal was denied on January 26, 1966 (TR 23).

B. Proceedings in the federal courts

Appellant filed a petition for writ of habeas corpus in the district court on April 5, 1966 (TR 1). On December 6, 1966, the petition was denied (TR 32). On December 15, 1966, Judge Zirpoli granted appellant's application for a certificate of probable cause and for leave to appeal (TR 38). On January 4, 1967, appellant filed a notice of appeal to this Court (TR 40).

/

/

---

1. "TR" refers to the Transcript of Record.

## STATEMENT OF FACTS

The victim, a United States Treasury Agent, testified that he lived in an apartment building with approximately 20 units at 271 Vernon Street in Oakland.[2/]

On Friday, September 13, 1963, at about 7:00 p.m., he left the apartment for the week end, turned off the lights, and locked the door. Early the following morning, at 3:30 a.m. on September 14, pursuant to directions received on the police radio, three officers converged on the premises. Officer Lusk, the first to arrive, talked to a man coming out of the driveway of the premises and went down the driveway into a garage area under the apartment building. He continued on through a door to the back of the building to another parking area under the apartment and checked the automobiles there. Officer Hoover, who pulled up as Lusk was getting out of his car, walked over and talked to the reporting party in the driveway with Lusk. While he was still there Officer Fiege arrived and joined the conversation. Hoover went down to check cars in the subterranean garage.

---

2. The facts in this case are taken from the opinion of the Court of Appeal, "Exhibit B."

Fiege went searching down through the garage and out the same door through which Lusk had exited toward the rear of the building. He descended some stairs which led to a back driveway leading to the carports under the apartment. Just before he entered the driveway he heard a commotion of feet moving in the driveway and around the side of the building. He stepped around the corner, showed his flashlight in the direction from which he had heard the noise, and saw the lower half of a man going in the doorway in the middle of the building. He shouted, "Come out of there," went to the doorway and observed two men going through a doorway at the top of some stairs at the end of a hall. He got to the top of the stairs in time to see the two men running down another hallway. He observed that they both had on dark clothes and that the rearmost of the two men had black gloves on and some kind of black cloth in his left rear pocket. The man in front seemed to have a suit coat on, and the other a knit type sweater. Fiege was running and shouting "Halt," but the men did not halt. They ran out of the building, turned right on Vernon Street, and turned off Vernon Street into a driveway.

Meanwhile Lusk, who was also in the rear of the building, had heard Fiege's shouts. He turned and

saw Fiege starting up the stairway. He ran over and saw Fiege at the first landing with someone running ahead of him. Lusk doubled back around the side of the building, and by the time he came to the street no one was there.

Hoover, who was just about to go through the door from the subterranean garage to the rear, heard the shouts and sounds of running to the rear of the building. He ran toward the street and as he came up the stairway saw "people" running south on Vernon with Officer Fiege running after them. He chased them down Vernon Street and saw one turn in the driveway.

Fiege, who was tired, gave up the chase at the point where Hoover overtook him, and returned to his patrol car. Hoover ran into the driveway and stopped momentarily in a parking area. He heard sounds to the south and to the west, and followed those which he believed to be the closer. Upon arriving at a stairway he saw a person descending and yelled, "Stop, police." The suspect turned north on reaching the street at the foot of the stairs, and Hoover, on arriving at the same street, observed him run northbound and turned to the left between two buildings. At this point Fiege drove by, conversed with Hoover and continued around the block. Hoover again saw the suspect as the latter emerged from between the two

buildings and started to run across a traffic island. When the officer again yelled, "Stop, or I will shoot," he stopped. Hoover held him, now identified as the appellant, at gun point. He was joined by Officer Dorsey who handcuffed appellant and in less than a minute Fiege came on the scene.

Both Fiege and Hoover noticed that appellant was out of breath and sweating profusely, and according to Hoover, he appeared to be frightened. He was attired in a white shirt, with a dark sweater which was tucked in at the collar, dark pants, dark shoes and no socks. He had black leather gloves on, and held a silver pen-light in his hand.

At the trial Hoover was asked to relate any conversation he had with appellant at this point. After objection was overruled the following transpired:

> "Q. ... What did you say? A. I asked him what his name was. Q. What did he say? A. He didn't say anything. Q. Any other questions by you? A. I asked him where he was going in such a hurry. Q. What did he say, if anything? A. He didn't say anything." (Exh. B, p. 5).

Hoover then searched appellant and found the following: Three pairs of socks - gray, black and

argyle - and a black silk sack in his left rear pants pocket; a second small pen-light in the sack; a black Navy watch cap in the right front pants pocket; a pair of bolt cutters with the handles cut off in his right rear pants pocket; and three plastic strips in his only shirt pocket. Appellant carried no wallet, credit cards or anything else indicating his identification. He had nothing else on his person other than a normal man's white handkerchief and money amounting to seven or eight dollars.

Fiege placed appellant in his patrol car and returned to park in front of 271 Vernon Street. Hoover retraced his steps in a vain search for anything that might possibly have been thrown away. Meanwhile Lusk had been looking around the apartment building and found the door of apartment 002 open two or three inches. The apartment was dark and no one responded when he rang the bell. He went out to the front to get another officer to enter the apartment with him.

Lusk met Hoover, who had returned to the apartment building, and they returned and entered apartment 002. They observed three jewelry boxes and the scattered contents thereof on the bed, and drawers of a dresser standing open.

At the trial Fiege was interrogated as to what transpired in the police car and, after appellant's objection was overruled, testified as follows:

"'Q. All right, what did you say to the defendant; what was the conversation, Officer? A. I asked the defendant his name. He did not answer. I asked him his address. He did not answer. I asked him who he had been with. He did not answer. I asked him if there was anybody in the area that I could contact to clear him, and he still did not answer.'" (Exh. B, p. 6).

The witness continued:

"'This took a few minutes. I was interrogating him and Officer Hoover came to the side of the car and said, "There was a burglary committed in that building."'" (Exh. B, p. 6).

These remarks were stricken pending presentation of further foundation and argument which ended in the overruling of defendant's objection, and the examination continued as follows:

"'Q. What did Officer Hoover say? A. Officer Hoover told me that there had been a burglary committed in 271 Vernon Street. Q. Did you

have further conversation with the defendant at that time? A. I did. Q. What did you say and what did he say? A. I told the defendant that there was a burglary in that building and he was under arrest for investigation of burglary, and I asked him if he had anything to say for himself. I repeated this twice. On the third time he said, his answer was, "Was there a burglary committed in that building?"'" (Exh. B, p. 7).

According to the officer the only other remark which was passed to or from the defendant was, in the witness' words:

"'The only thing I did say was that we would have to book him without a name because he wouldn't give us his name or address or anything else.'" (Exh. B, p. 7).

APPELLANT'S CONTENTIONS

1. The United States District Court erred in holding that appellant was not entitled to the benefit of the rule of prespective application of Griffin v. California according to Tehan v. Shott. It further erred in holding that Johnson v. New Jersey controls the application of Miranda v. Arizona.

## SUMMARY OF APPELLEE'S ARGUMENT

I. The district court properly denied the writ because of the time in which appellant's case arose.

II. Nothing in Griffin requires the rejection of the inference to be drawn from appellant's nonassertive conduct, or from his silence prior to the accusatory stage, when it is not rested on constitutional grounds.

III. Even if there was error the harmless error rule applies.

## ARGUMENT

### I

### THE DISTRICT COURT PROPERLY DENIED THE WRIT BECAUSE OF THE TIME IN WHICH APPELLANT'S CASE AROSE

The district court denied the petition for a writ of habeas corpus on the ground that appellant was not denied his federally protected constitutional rights because of the time at which his case arose (TR 33).

Judge Zirpoli stated:

> "Petitioner's trial commenced February 20, 1964. It is now clear that the silence of an individual under police custodial interrogation cannot be used against him in a criminal trial, Miranda v. Arizona, 384 U.S. 436, 468 n. 37 (1966); however, the holding in Miranda

is not available to persons whose trials began before June 13, 1966, Johnson v. New Jersey, 384 U.S. 719 (1966). Petitioner contends that footnote 37 in the Miranda opinion which supports his position should not be measured by the prospective application ruling of Johnson, but by the rule of prospective application for Griffin v. California, 380 U.S. 609 (1965), as stated in Tehan v. Shott, 382 U.S. 406 (1966). . . . Nonetheless, the plain language of Miranda indicates that petitioner's contention is not well taken. . . .

. . . .

"It is apparent by a reference to the relevant text of the opinion which discusses the coercive evils of interrogation of a suspect, including the dilemma posed by silence in the face of accusations and also the precise language of the footnote that the footnote is considered a part of the holding in Miranda. The reference to Griffin v. California, supra, is merely by way of analogy and does not indicate that the prospectivity should be governed by the same rules applicable to Griffin.

"Accordingly, this petition for writ of habeas corpus must be and hereby is DENIED, . . . ." (TR 33, 34, 35).

Appellant relies on footnote 37 in the Miranda opinion (34 U.S.L. Wk. at 4530), which states in part:

"In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation. Cf. Griffin v. California, 380 U.S. 609 (1965); Malloy v. Hogan, 378 U.S. 1, 8 (1964); Comment, 31 U. Chi. L. Rev. 556 (1964); Developments in the Law - Confessions, 79 Harv. L. Rev. 935, 1041-1044 (1966). See also Bram v. United States, 168 U.S. 532, 562 (1897). (Emphasis added).

Petitioner contends that by virtue of the court's citation of Griffin v. California, supra, it intended that that part of its opinion in the Miranda case be afforded the same degree of retrospectivity as was afforded the rule in Griffin. See Tehan v. Shott,

382 U.S. 406 (1966). However, in Johnson v. New Jersey, the court expressly declared that: "Miranda applies only to cases in which the trial began after the date of our decision one week ago." (Emphasis added). 34 U.S.L. Wk. at 4593.

Appellant further asserts that the rules of Miranda v. Arizona, supra, and Johnson v. New Jersey, supra, have application to the case at bench only insofar as Miranda aids in the interpretation of Griffin v. California, supra. Appellant further argues that his case falls within the holding of Griffin.

Appellees submit that this case does not fall within the holding of Griffin and that the date of trial is controlling. This is supported by an analogy on the kindred decisions of Griffin and Tehan. In Griffin, the United States Supreme Court held for the first time that adverse comment by the court or the prosecution to the jury on an accused's silence during a state trial (not prior to trial) violates the proscription against self-incrimination included in the Fifth Amendment to the Federal Constitution. While this ruling was necessarily premised upon the prior ruling in Malloy v. Hogan, 378 U.S. 1 (1964), the court in Tehan ruled that Griffin did not apply to all cases tried subsequent to Malloy but

only to those not "finalized," in the sense of Linkletter v. Walker, 381 U.S. 618 (1965), as of the date the decision in Griffin was announced. Appellees submit that the relationship between Malloy and Miranda in the realm of "implied admissions" is closely analogous to the relationship between Malloy and Griffin in the realm of adverse comment on an accused's silence at trial. Just as the decisional seed which later bloomed in Griffin is impliedly imbedded in Malloy, so too is Miranda's clear proscription of "implied admission" evidence genealogically connected to Malloy. However, while the proscription against adverse comment on the accused's silence at trial was implicitly promulgated by Malloy, it was not explicated therein. This was left to Griffin. Likewise, while the proscription against evidentiary use of "implied admissions" was implicit in Malloy, it was Miranda that first spelled it out. Hence, it logically follows that the ruling banning the evidentiary use of "implied admissions" first explicated in Miranda, need only be applied to those cases wherein the trial occurred after the date of the Miranda decision as expressly stated in Johnson v. New Jersey, supra.

/

/

II

## NOTHING IN GRIFFIN REQUIRES THE REJECTION OF THE INFERENCE TO BE DRAWN FROM APPELLANT'S NONASSERTIVE CONDUCT, OR FROM HIS SILENCE PRIOR TO THE ACCUSATORY STAGE, WHEN IT IS NOT RESTED ON CONSTITUTIONAL GROUNDS

The original questions propounded to appellant before the discovery of the burglary were not accusatory statements and there was no attempt to foist the declaration of others on the appellant as his own admissions.

The appellant's failure to respond to inquiries concerning his name, address, destination, companions, if any, and acquaintainship in the neighborhood is in no sense the adoptions of declarations of others. No declarations or statements of the appellant were involved, and his silence cannot be distinguished in this regard from his other nonassertive conduct in fleeing from the scene and twice previously refusing to obey the officer's command to halt which was evidence, in and of itself, from which the jury could infer guilty knowledge.

At the time the preliminary questions were asked, the officers did not know what crime, if any, had been committed. The questions were not designed to elicit incriminating statments, but to afford the defendant an opportunity to explain his presence and actions. The foregoing principle not only covers the evidence of

the original interrogation by both officers to which appellant failed to respond, but also the question after the burglary was discovered when appellant was asked if he had anything to say for himself and responded: "Was there a burglary committed in the building?" (RT 14, 15). As demonstrated hereinabove, the only "implied admissions" were directly attributable to appellant's nonassertive conduct in fleeing from the scene of the crime and failing to halt, not from failure to give his name and address or the final question he asked the police officers.

Even, arguendo, if the probative facts elicited be deemed extrajudicial statements, as distinguished from nonassertive conduct, they were admissible as admissions obtained before the authorities had commenced a process of interrogation that lent itself to eliciting incriminating statements. Absent therefore was one of the conditions deemed essential to render the statements inadmissible under the rules laid down in Escobedo, Dorado and Stewart. Since the Griffin rule on its face does not apply to commentary on appellant's conduct prior to trial, the considerations of reasonable investigation should control.

/

III

EVEN IF THERE WAS ERROR
THE HARMLESS ERROR RULE APPLIES

Appellees submit that there was no reasonable possibility that the evidence complained of might have contributed to appellant's conviction. In Chapman v. California, 17 L.Ed.2d 705 (1967), the Supreme Court stated:

> "[T]here may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the federal constitution, be deemed harmless, not resulting in the automatic reversal of the conviction."

Appellees submit that in the instant case when the record is reviewed in the light of Chapman that there is not the slightest doubt that, if error was committed, it did not contribute to appellant's conviction. The record discloses the following facts:

(1) Police offficers observed appellant fleeing from the burglarized building.

(2) Appellant failed to obey the police officers command to "halt."

(3) Appellant finally stopped when the officer again yelled, "Stop, or I will shoot."

(4) Appellant was out of breath and sweating profusely when stopped, was wearing black leather gloves and held in his hand a silver penlight.

(5) Found in his possession were burglary tools and a pair of brown argyle socks. Three pairs of socks had been stolen from the burglarized apartment and one pair was brown argyle.

(6) Appellant's alibi was that he was out for a walk, found a black bag, was examining its contents, trying on the gloves and putting things in his pocket when he was seen by the arresting officers. He denied ever being in the burglarized apartment.

Under these circumstances, appellees submit that it is demonstrated beyond a reasonable doubt that the complained of evidence, even if inadmissible, did not contribute to appellant's conviction. See Wilson v. Anderson, 379 F.2d 330 (9th Cir. 1967).

## CONCLUSION

Appellees submit that in the instant case there was no constitutional Griffin or Miranda error. The record clearly demonstrates that the police acted reasonably toward appellant and that if there was error the

harmless error rule should apply.

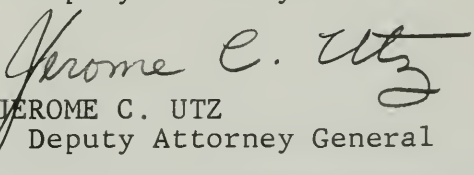
It would not be fair to the state nor to the public to vacate judgments such as this one on the basis of constitutional standards which are in flux and could not have been reasonably anticipated by the police at the time they acted. To hold otherwise would run counter to the Supreme Court's course in Johnson v. New Jersey, in which the desirability of finality in criminal judgments comporting with juxtoposed constitutional standards is recognized.

It is respectfully submitted that the order of the district court denying the petition for writ of habeas corpus should be affirmed.

Dated: November 6, 1967

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General



JEROME C. UTZ
Deputy Attorney General

Attorneys for Respondent-Appellee

JCU:pp
CR SF
66-534

## CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

Dated: November 6, 1967

Jerome C. Utz

JEROME C. UTZ
Deputy Attorney General